Supreme Court, U. S.
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NO. 78-731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,
Appellant

v.

UVALDE COUNTY, TEXAS, ET AL,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO DISMISS OR AFFIRM

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Pursuant to Paragraphs 1(b) and (c) of Rule 16 of the rules of this Court, Appellees Uvalde County, et al, move that the appeal be dismissed or, alternatively, that the Judgment of the District Court be summarily affirmed.

OPINION BELOW

The opinion of the District Court has been published. *Garcia, et al v. Uvalde County, et al,* 455 F.Supp. 101 (W.D. Tex., 1978).

QUESTION PRESENTED

In its Jurisdictional Statement (p. 2) Appellant presents the question to be decided on this appeal in the following manner:

> "Whether, under Section 5 of the Voting Rights Act and implementing regulations, the Attorney General's objection to a County redistricting plan was untimely because it was entered more than sixty (60) days after receipt of the County's initial inadequate response to the Attorney General's first request for additional information."

Appellees suggest that this manner of phrasing the question presented is inaccurate because the majority of the three judge District Court found that the County's initial response to the Attorney General's first request for additional information was not inadequate. This finding will be discussed below; therefore, with their exception noted, Appellees adopt the question presented by Appellants.

STATEMENT

The relevant facts are set out in the Memorandum Opinion and Order of the District Court which is an appendix to the Jurisdictional Statement of Appellant (Jurisdictional Statement, pp. 3a-8a). Therefore, rather than burden the Court with repetition, Appellees, as they did in their Motion to Dismiss or Affirm in No. 78-580,[1] will summarize the facts, in outline form, as follows:

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1. A separate appeal by private Plaintiffs.

1. Initial submission	March 22, 1976
2. Attorney General requests additional information items A, B and C (first request) (Jurisdictional Statement, pp. 39a-40a)	May 19, 1976
3. Uvalde County responds with A and B and states "we don't have any way" of providing C (first response) (Jurisdictional Statement, pp. 41a-43a)	May 28, 1976
4. Attorney General requests additional information items D, E, F, and G and again, C (second request) (Jurisdictional Statement, pp. 44a-46a)	July 30, 1976
5. Uvalde County responds with available information requested but reiterates the unavailability of item C (second response) (Jurisdictional Statement, pp. 47a-51a)	August 12, 1976
6. Attorney General interposes objection (Jurisdictional Statement, pp. 52a-54a)	October 13, 1976

Slightly more than two weeks prior to the November 1, 1976 general election and approximately 205 days after the submission process began, the Attorney General's office objected to an apportionment scheme adopted and in effect since 1973. Under the 1973 reapportionment, a Mexican-American was elected County Commissioner in Uvalde County; prior to that time, at least in recent years, no Mexican-American had ever been elected to that position.

The District Court held that upon receipt by the Attorney General of Uvalde County's May 28, 1976 response to the Attorney General's first additional information request the submission was complete. The Attorney General was not authorized to postpone the start of the sixty day period of assessment of the Appellees' submission by requesting more (different) information or by repeating a prior request for information which the submitting authority had already stated was unavailable (Memorandum Opinion and Order, Jurisdictional Statement, p. 12a). Therefore, the Court held, Appellees' submission was complete as of June 1, 1976, the date on which Appellees' May 28, 1976 response to the Attorney General's first request for additional information was received. Since the Attorney General did not interpose an objection within sixty days after June 1, 1976, the District Court held that Uvalde County had complied with Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and was free to continue in effect the 1973 reapportionment.

ARGUMENT

At the trial of this cause, as noted in the opinion of the District Court (Jurisdictional Statement, pp. 8a, 10a) the United States argued that the Attorney General could make as many requests for additional information, each time postponing the start of the sixty day period for assessing a submitting voting change, as he deemed desirable. Now, Appellant perceives the decision of the District Court as establishing "an arbitrary rule to the effect that the Attorney General is limited to a single request for further information and must act on the basis of that response, whether adequate or not." (Juris-

dictional Statement, pp. 14-15). The District Court established no such rule.

Here, the District Court was presented with a case in which Uvalde County, in response to the Attorney General's first request for additional information, provided him with the information requested except for information which the County, in clear and unequivocal language, stated was not available. After considering the evidence presented by the Defendants-Appellees,[2] the District Court made the following findings:

> "Thus, as of June 1, 1976, the date on which the County Judge's May 28, 1976 letter with enclosures responding to the Attorney General's first request for additional information letter was received, Uvalde County had (1) made the initial submission of the 1973 reapportionment and (2) supplied the Attorney General with all of the information he had requested that was available to the County." (Memorandum Opinion and Order, Jurisdictional Statement, p. 7a).

Based on this finding, the District Court concluded as follows:

> "Once the submitting authority complies with the Attorney General's request for additional information the sixty day period commences. The Attorney General may not further postpone the commencement of that period by requesting still more information or by repeating his request for information which the submitting authority has already stated to be unavailable.

2. The United States chose not to present any evidence.

> "Applying this principle to the case before us we find that the sixty day period commenced on the date that the Attorney General's office received Uvalde County's response to the first request for additional information letter, June 1, 1976. By that date, the Attorney General had been supplied the information he requested in his May 19, 1976 letter except for the population (as opposed to registered voters) information which the County Judge stated was not available. The submission was, therefore, according to the regulations, complete." (Memorandum Opinion and Order, Jurisdictional Statement, pp. 12a-13a).

Thus, Appellant's reading of the decision below is erroneous.

Furthermore, Appellant attempts to bolster its argument by seeking to have this Court decide *de novo* the *facts,* notwithstanding Rule 52(a) of the Federal Rules of Civil Procedure and this Court's admonition in *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 495-496, 70 S.Ct. 711, 717 (1950):

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently and find a more sinister cast to actions which the District Court deemed innocent. [citations omitted]. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.' "

Because of Appellant's somewhat misleading characterization of the facts, Appellees will again discuss the evidence before the District Court.

As set out in the summary of the relevant facts, above, Uvalde County made its initial submission on March

22, 1976. Along with a letter of that date (Jurisdictional Statement, pp. 29a-35a) Uvalde County enclosed various documents, correspondence and newspaper clippings. On May 19, 1976 the Attorney General's office requested additional information (Jurisdictional Statement, pp. 39a-40a).

In this first request letter of May 19, the Attorney General's office asked for the following information:

(1) Population and number of registered voters by race for each precinct both before and after the 1973 reapportionment;

(2) Map of the County showing the outlines of the precincts before and after the change;

(3) Indications on that map, or on a separate map, of the areas in which Mexican-Americans primarily reside.

The County's response to this request (Jurisdictional Statement, pp. 41a-43a) is best summarized by the District Court, as follows:

> "On May 28, 1976, the County Judge responded to the Attorney General's first request for additional information letter referred to above. In this letter, the County Judge responded to each of the requests made by the Attorney General in his additional information letter. First, the County Judge attached to the letter a chart showing the number of registered voters by race and ethnicity for each precinct before and after the reapportionment. Second, he included maps of the City and of the County of Uvalde showing the precinct boundaries and he described in his letter the areas in which the Mexican-American population tended to con-

> centrate. However, with respect to the Attorney General's request for exact population figures or estimates of total population, as opposed to the number of registered voters, in each precinct, the County Judge made the following statement:
>
> > 'We do not have any way of telling the total population of these districts before and after this change was made.'
>
> Such a statement on behalf of the submitting authority was not only appropriate but required by the regulations of the Attorney General. 28 C.F.R. § 51.10(b)(8)." (Memorandum Opinion and Order, Jurisdictional Statement, pp. 6a-7a).

Appellant apparently argues, contrary to the findings and holding of the District Court, that this response "ignores the request or withholds the data sought" and, therefore, was "not effective" to start the sixty day period (Jurisdictional Statement, p. 16).

First, Appellant argues that the statement in the letter indicating the location of Mexican-American residential concentrations was inadequate and that the Attorney General, to "avoid acrimony" was forced to ask for the information a second time in his second request for additional information (letter of July 30, 1976, Jurisdictional Statement, pp. 44a-46a). That is incorrect. The District Court expressly found this response adequate. Furthermore, there is nothing in the July 30, 1976 letter (second request) indicating that the map and description of residential concentrations of Mexican-Americans in the May 28, 1976 letter was insufficient or inadequate or in any way failed to provide the Attorney General with the information he had requested.

In fact, the letter of July 30 requests a *different* map, i.e., one indicating on a map showing boundary lines and residential concentrations "the location of polling places" (Jurisdictional Statement, p. 45a). That had not been requested before.

Second, Appellant argues that the County had, in prior correspondence, referred to "census reports" used in the reapportionment process.[3] Therefore, Appellant argues, it was "difficult to accept" the County's response that the population figures requested were not available and, therefore, the Attorney General "merely exhibited patience" by sending a second request for additional information letter again asking for the population by race or ethnicity for each precinct (Jurisdictional Statement, p. 17). That argument is contrary to the regulations, discussed below, and the holding, implicit in the opinion of the District Court, that the inquiry of the Attorney General comes to an end when the submitting authority states that information is not available. Furthermore, the record shows that the Attorney General was not acting in "good faith", trying to "avoid acrimony" but, was merely delaying the submission process.

Robert Chavez, the second research analyst in the Attorney General's office assigned to Uvalde County's submission, testified that the Attorney General's office maintains a file of all United States census information. He further testified as follows:

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3. The "census reports" had previously been characterized, in a 1974 letter from Uvalde County to a Mr. Gomez that was included in the original submission, as being "almost useless".

> "The Mexican-American population, or Spanish-speaking population, is not available, except for SMSA's, and Uvalde County not being a SMSA, it is not available. . . . That's the first thing we look at when we receive a submission, and the books are in our office." (Deposition Transcript, p. 37).

He later again admitted that it's impossible to determine the population by ethnicity in each precinct from official sources (Deposition transcript at 72) and that it's "not available anywhere." (Deposition transcript at 70). Thus, Appellant can hardly argue that it was acting in good faith when it was requesting information that the submitting authority had stated was not available and that the Attorney General's office knew was not available. Additionally, the reference in prior correspondence to "census reports" or other population figures in no way conflicts with the statement of Uvalde County in its response to the first additional information request that the County had no way to determine population *by race or ethnicity for each precinct.* It is obvious from the evidence presented to the District Court that the Attorney General was not acting in good faith and was merely, for reasons of his own, delaying what is supposed to be an expeditious submission process.

The District Court applied the unambiguous regulations promulgated by the Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to the evidence before it. Therefore, the appeal raises no substantial Federal question justifying further argument.

The Attorney General has sixty days in which to interpose an objection to a submitted change affecting voting. 42 U.S.C. § 1973c; 28 C.F.R. § 51.3(a). The sixty day

period commences upon the receipt of information meeting the requirements of § 51.10(a) of the regulations. 28 C.F.R. § 51.3(b).

Section 51.10(a) states that each submission shall contain certain information described in § 51.10(a)(1)-(5)[4] plus "other information which the Attorney General determines is required to enable him" to make his determination. § 51.10(a)(6). Subpart (6) also states that when such other information is required, the Attorney General shall notify the submitting authority in the manner provided in § 51.18(a).

Section 51.18(a) of the regulations requires the Attorney General to request "such further information as is necessary" and provides that the sixty day period will commence upon the receipt of "such information". Importantly, that subsection of the regulations also states that *"[t]he request"* shall be made promptly after the Attorney General receives the original submission (emphasis added). Thus, the regulations clearly contemplate a single request postponing the sixty day period.[5] Here, the first request was made on May 19, 1976. This first request was certainly not prompt, coming close to the 60th day after the initial submission.

Section 51.18(a) of the regulations, providing for the start of the sixty day period upon the receipt of the

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4. Appellants do not argue that these requirements were not met.

5. The dissenting judge in the District Court believed that the Attorney General could make more than one request for additional information but, within sixty days of an inadequate initial submission. When the requested information was received the formal sixty day period began. His disagreement with the majority, apparently, was on the *facts*, i.e., whether the County's first response was adequate. (Jurisdictional Statement, p. 15a).

§ 51.10(a) information, must be read in connection with § 51.10(b)(8). There, it is provided that when information requested is unavailable, the submission should so state. These regulations, read together, clearly indicate that the Attorney General has no authority to indefinitely suspend the sixty day period when requested information is stated to be unavailable. If such authority were given, Congress' sixty day requirement in Section 5 of the Voting Rights Act would be meaningless.

The District Court applied these regulations to the circumstances present here. In the manner required by the regulations, Uvalde County complied with the first request for additional information on May 28, 1976 by providing the Attorney General with the information he had requested except that which the County stated was unavailable. Therefore, pursuant to the regulations, the submission was complete on June 1, 1976, the date the Attorney General received the County's first response, more than sixty days prior to the October 13, 1976 objection of the Attorney General.

Appellees do not deny the Attorney General the right to request additional information a second time. In fact, the regulations expressly provide for the situation in which a second request is desirable to avoid acrimony between the Attorney General and the submitting authority. See *Georgia v. United States,* 411 U.S. 526, 540-541, 93 S.Ct. 1702, 1710-1711 (1973). However, the second request for additional information must be made "*during* the sixty day period", not postponing it. 28 C.F.R. § 51.18(b)(1) (emphasis added).[6] Thus, the District

6. Appellant states that the Attorney General requested additional information more than once in 45 of the 5,450 submissions received

Court properly held that the Attorney General's second request on July 30, 1976, did not effectively postpone the start of the sixty day period.

The decision of the District Court is not in conflict with the Court's decision in *Georgia v. United States, supra.* There, § 51.18(a) of the regulations allowing the Attorney General to postpone the start of the sixty day period by requesting additional information was held to be reasonable and valid. The request for additional information procedure was not used in that case to postpone the start of the sixty day period a second time after the submitting authority had complied with a prior request for additional information. Other facts distinguishing the *Georgia* case from this one are dealt with in the Memorandum Opinion and Order of the District Court, (Jurisditional Statement, pp. 11a-12a).

CONCLUSION

For these reasons, Appellees submit that this appeal does not bring a substantial Federal question before the Court. Therefore, Appellees move the Court to

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between January 1, 1976 and March 31, 1978 (Jurisdictional Statement, p. 19). These "statistics" were not offered into evidence in the District Court. Nevertheless, there is no indication that in any of the 45 instances the second request was used to again postpone the start of the sixty day period. Thus, the administrative practice is not in conflict with 28 C.F.R. § 51.18(b)(1) and the decision of the District Court which allow second requests during the sixty day period. Furthermore, the "statistics" do not show that in these 45 second requests the Attorney General sought information that had not been requested before or information that had already been stated to be unavailable as was the case here.

summarily dismiss the appeal or affirm the Judgment of the District Court.

Respectfully submitted,

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Intervenors-Appellees, Norment Foley and Gene Ilse, adopt the foregoing Motion in full.

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CERTIFICATE OF SERVICE

I, Jeffrey A. Davis, a member of the Bar of the Supreme Court of the United States, hereby certify that on December 1, 1978, pursuant to Rule 33 of the Supreme Court Rules, I served three copies of the foregoing Motion to Dismiss or Affirm on each of the interested parties by placing such copies in the United States mail, first class postage prepaid, addressed to the following persons:

Paul D. Rich, Winter Garden Project, Texas Rural Legal Aid, Inc., P. O. Drawer 707, Crystal City, Texas 78839, Attorney for Plaintiffs Richard Garcia, et al; Lloyd Lochridge, McGinnis, Lochridge & Kilgore, 5th Floor, Texas State Bank Building, Austin, Texas 78701, Attorney for Intervenors-Appellees; Rogelio Munoz, 231 S. Getty Street, P. O. Box 1434, Uvalde, Texas 78801, Attorney for Gilbert Torres; and the Solicitor General, Department of Justice, Washington, D.C. 20530, for the United States.

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